In the High Court of Judicature at Madras

Dated : 27/12/2002

Coram :

The Honourable Mr.Justice R.Jayasimha Babu
and
The Honourable Mr.Justice E.Padmanabhan

W.P. No.744 of 1992

A.S.Parveen Akthar Petitioner
vs.

1. The Union of India,
represented by the
Secretary to Government,
Ministry of Law,
New Delhi.

2. Y.Md. Ismail Farook

3. The Station Director,
All India Radio,
Madurai 625 002.

4. Association for Women Assistance
and Security (AWAS) rep. by its
Secretary I.Abdul Bhai
(R4 impleaded as per order in WMP
No.32204 of 1993 dt. 18.12.1997)

5. Mrs.Bader Syed

6. Tamil Nadu Advocates Meelad
Forum represented by its
President A.S.Bibi John Respondents
(R5 & 6 impleaded as per order in
WMPs. 27207 & 30327/1998 dated
15.04.1999)

Writ Petition filed under Article 226 of the Constitution of India for the issue of writ of declaration declaring Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 in so far as it seeks to recognise and validate Talaaq-ul-Biddat or Talaaq-i-Badai form of divorce as void and unconstitutional.

For Petitioner : Mr.Javed and Mr.P.V.S.Giridhar

For Respondent 1 : Mr.V.T.Gopalan
Additional Solicitor General,
assisted by Mr.R.Santhanam

For Respondent 2 : Mr.Mohamed Yousuf

For Respondent 3 : Mr.S.Veeraraghavan

For Respondent 4 : Mr.Zafarullah Khan, for
Mrs.Geetha Ramaseshan

For Respondent 5 : Ms.G.Kavitha

For Respondent 6 : Mr.S.B.Fazluddin

:ORDER

R.Jayasimha Babu, J.

The relief sought in the writ petition is for a declaration that Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937 in so far as it seeks to recognise and validate Talaaq-ul-Biddat or Talaaq-i-Badai form of divorce as void and unconstitutional. 2. The petitioner is a Muslim woman who was aged 27 years at the time of her marriage, on 06.02.1990 to the second respondent and who on 01.05.1991 was intimated through her father that the second respondent had pronounced talaq in the presence of two witnesses in a single sitting in Talaq-ul-biddat or Talaq-i-badai form. She has stated that after her marriage to the second respondent according to the Sunni Mohammadan rites and customs and after she commenced her marital life with the second respondent, she was ill-treated in various ways and forced to undergo abortion against her wishes. She has also stated that her parents had been compelled to give dowry before the marriage and that even after that the second respondent threatened to divorce her if she did not persuade her parents to give him a scooter as an additional dowry. She has stated that she is employed as a typist in the Public Works Department, that she had sought and obtained transfer to Madurai, that she was sent out of marital home on 04.03.1991, and that she was forced to stay in a local ladies hostel. She has stated that the second respondent had told her that he would permit her to live with him only if additional dowry is given to him by her parents.

3. She has further averred that after the receipt of the notice sent by the second respondent to her father in which it was stated that he had effected divorce in Talaq-ul-biddat form, attempts were made to persuade the second respondent to take back the petitioner, but he declined to do so on the ground that the irrevocable talaq had already taken place. She has stated that on a complaint being made to the police about the dowry harassment, the second respondent's parents returned

Rs.10,000/- out of the amount of Rs.15,000/- paid as dowry and also some of the articles given by her parents at the time of the petitioner's marriage.

4. She has averred that Talaq-ul-biddat is not a mode recognised in the Quran, and that the Holy Book provides for reconsideration and reconciliation before recognising divorce as irrevocable. The petitioner has referred to Chapter IV verse 35 of Quran which says, "Any if you fear a breach between the two, appoint an arbiter from his people and an arbiter from her people. If they desire agreement, God will effect harmony between them." She has also stated that due to lack of knowledge and understanding of the permissible forms of talaq and of the need for reconciliation and reconsideration before it could be regarded as irrevocable, this form of talaq has been widely used resulting in untold misery and harm to the divorced wife and the children of the marriage.

5. It is her further case that the Muslim Personal Law (Shariat) Application Act, 1937, by providing for the application of Muslim Personal Law in matters relating to marriage where the parties are Muslims, conveyed a wrong impression that the law sanctions this sinful form of talaq which form, according to the petitioner is grossly injurious to the human rights of the married Muslim women and offends Articles 14, 15 and 21 of the Constitution. She has submitted that the assumptions and beliefs upon which such a form of divorce is recognised are factually false, scientifically untenable and contrary to the spirit and provisions of the Constitution. She has also stated that this form of divorce has been declared to be a spiritual offence in the Quran and giving recognition to that form interferes with the Muslim women's right to profess and practice her religion, inasmuch as it unleashes a spiritual offence on her and is thus, violative of Article 25 of the Constitution.

6. Though the petition was initially filed only against the Union of India, Ismail Farook, to whom she was married in the year 1990 and who pronounced talaq on 01.05.1991 and the Station Director of All India Radio, the employer of the second respondent, subsequently, three other respondents were added. The respondents subsequently added are - the Association for Women's Assistance and Security (AWAS), Mrs. Badar Syed, wife of Dr.Zaheer Ahmed Sayeed, and Tamil Nadu Advocates Meelad Forum. The allegations made against Ismail Farook stand unrebutted. He has not filed any counter affidavit. His employer has in the affidavit filed stated that the second respondent had reported to his employer that he has remarried.

7. For the Union of India a counter affidavit has been filed through it's Assistant Legislative Counsel. He has averred that Muslim Personal Law (Shariat) Application Act, 1937 came into existence only for the purpose of making the Personal Law applicable to Muslims and certain maters as specified in Section 2 of that Act and that it is a social legislation to make applicable the Shariat law which is a well recognised and purest form of law as imbibed in Quran, Hadis, Ijma and Qiyas.

Reference is made in the affidavit to the decision of the Jammu and Kashmir High Court in the case of Ahmed Giri vs. Mst. Begha, AIR 1955 J & K 1, in which it was observed that 'talak-ul-biddat' is the most prevalent form of divorce among Muslims in India. It is also pointed out that there are seven different schools of Muslims law which have interpreted the Islamic law and it has been the policy of the Government not to bring changes in Personal Laws unless an initiative comes from the community. It is also asserted in the affidavit that Personal Laws are not within the purview of Article 13(1) of the Constitution, that there is no separation of Personal Law and religion in the tenets of Islam, and that this form of talaq is well recognised and that it forms part of the Muslim Personal Law. It is submitted in the affidavit that the Shariat Act, 1937 though is a preconstitutional enactment, is valid even now and Section 2 of that Act is constitutionally valid.

8. For the added respondent the Association for Women's Assistance and Security (AWAS) it is stated by it's Secretary I.Abdul Bhai in his affidavit that the association is championing the cause of the muslim women who have been rendered destitute and are victims of this pernicious form of divorce which is un-Islamic and un-Quranic.

9. Mrs. Bader Syed in her affidavit has stated that she is a practising advocate in the High Court and her area of practice has been exclusively in women's rights and family laws. She states that she has published several articles and papers concerning the family law and more specifically Muslim law as it relates to women. She adopts in toto the legal grounds raised by the petitioner. She has stated that in her day to day practice as a lawyer and activist working at the grass root level for the causes of marginalised women, she has come across numerous cases of the arbitrary and rampant divorce by way of triple talaq practised among the Muslims and that she has tried to counsel and explain to the parties concerned that the triple talaq is illegal as per the Holy Quran and is considered sinful. She has stated that this form of divorce is unilateral, arbitrary and gives no chance for reconciliation between the parties. She has also stated that it is very often used as a weapon by men not to pay maintenance.

10. She has in her affidavit stated that she has been the Chairperson of the State Minorities Commission, of the Government of Tamilnadu for some years and that during that period she came across innumerable victims of this violation of the dicta propounded in the Holy Quran; that the question raised by the petitioner is of great importance to Muslim women and affects their right, dignity and human rights; and has pointed out that in several Muslim countries legislation has been enacted in the areas of polygamy and divorce procedures keeping in mind the social milieu. She has also averred that unless this form of talaq is declared as null and void and opposed to Quranic injunctions, Muslim women of the country would be socially and economically deprived of their rights and entitlements as equal citizens of our country.

11. For the Tamil Nadu Advocates Meelad Forum an affidavit has

been filed by it's President. The deponent seeks to place certain points regarded by the association as being relevant for the just adjudication of the issue raised in this petition. She has stated that triple repetition of the term 'talaq' renders it irrevocable. She has referred to certain decisions, wherein it has been held that though that form of divorce is theologically bad, it is perfectly valid in law. She has submitted that as the apex Court in it's decision reported in the case of Mst. Zohara Khatoon vs Mohd. Ibrahim AIR 1981 SC 1243, has observed that divorce given unilaterally by the husband is commonest form and is peculiar to Mohammadan Law, this form of talaq has to be accepted as being legal. She has contended that the prayers in writ petition are untenable and are not to be granted by the Court.

12. Mr. Javed, learned counsel for the petitioner invited attention to several passages in the texts on Mohammedan Law by Amir Ali, Badruddin Tyabji and Professor Tahir Mohammed.

13. Syed Ameer Ali, who was a member of the Judicial Committee of the Privy Council in his book on the Personal Law of Mohammedans titled "Mahommedan Law" compiled from the authorities in the original arabic, (5th edition) at page 572 states, "The reforms of Mohammed marked a new departure in the history of Eastern legislation. He restrained the power of divorce possessed by the husbands, he gave to the women the right of obtaining a separation on reasonable grounds, and towards the end of his life he went so far as practically to forbid its exercise by the men without the intervention of arbiters or a judge. He pronounced, "talaq to be the most detestable before the Almighty God of all permitted things, for it prevented conjugal happiness and interfered with the proper bringing up of children. The permission, therefore, in the Koran, though it gave a certain countance to the old customs, has to be read with the light of the Lawgiver's own words. When it is borne in mind how intimately law and religion are connected in the Islamic system, it will be easy to understand the bearing of the words on the institution of divorce. Naturally, therefore, great divergence exists among the various schools regarding the exercise of the power of divorce by the husband of his own motion and without the intervention of the Judge. A large and influential body of jurists regard talak emanating from the husband as really prohibited except for necessity, such as the adultery of the wife. Another section consisting chiefly of the M'utazilas, consider talak as not permissible without the sanction of the judge administering the Musulman Law. They consider that any such cause as may justify separation and remove talak from the category of being forbidden, should be tested by an unbiased judge; and, in support of their doctrine, they refer to the words of the Prophet already quoted, and his direction that in case of dispute between the married parties, arbiters should be appointed for the settlement of their differences. The Hanafis, the Malikis, the Sahfeis and the bulk of the Shiahs hold talak to be permitted, though they regard the exericse of the pwer without any cause to be morally or religiously abominable."

14. Regarding the 'talaq' recognised by the Hanafis, the learned author states, "Two kinds of talak are recognised by the Hanafis, viz., Talak-ussunnat, and (2), the talak-ul-bidat or talak-ul-badai. The talak-ussunnat is the divorce which is effected in accordance with the rules laid down in the traditions (the sunnat) handed down from the Prophet or his principal disciples. It is, in fact, the mode or procedure which seems to have been approved of by him at the beginning of his ministry, and is, consequently, regarded as the regular or proper and orthodox form of divorce. The talak-ul-bidat, as its name signifies, is the heritical or irregular mode of divorce, which was introduced in the second century of the Mahommedan era. It was then that the Omeyyada monarchs, finding that the checks imposed by the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of the law, and found in the pliability of the jurists a loophole to effect their purpose.

As a matter of fact, the capricous and irregular exercise of the power of divorce which was in the beginning left to the husbands was strongly disapproved of by the Prophet. It is reported that when once news was brought to him that one of his disciples had divorced his wife, pronouncing the three talaks at one and the same time, the Prophet stood up in anger on his carpet and declared that the man was making a plaything of the words of God, and made him take back his wife. The Shias and the Malikis do not recognise the validity of the talak-ul-biddat, whilst the Hanafi and the Shaffeis agree in holding that a divorce is effective, if pronounced in the bidat form, "though in its commission the man incurs a sin"."

15. In the book of Muhammadan Law by Faiz Badurddin Tyabji, Third Edition, 1940, in his introduction the author states that, "...where the standard set by the example and percept of the Prophet was found to be too novel or too high, there was a natural tendency to revert to the old customs and views of life. This tendency accounts for those rules of divorce, which in practice have fallen from the high standard set by Islam, but are nevertheless recognised as law, though admitted to be sinful. It explains the stringent way in which the rights of women are interpreted, though the interpretation may be opposed to logic and principle. "

16. After referring to the Quran, the sunna, ijma, and quiyas as foundations of Islamic law the author has set out some of the main characteristics of the form of divorce sanctioned in the Holy Book: (i)It is not pronounced when the husband is prevented from having intercourse with his wife owing only to her courses. (ii) Abstinence from intercourse is required. (iii) The divorce is suspended during the iddat and the husband has time to reconsider his decision, so that if the pronouncement is not revoked, there is indication that it was not capriciously or hastily made. (iv)After the divorce is complete and marriage dissolved, there being only one pronouncement, there is no

prohibition against re-marriage of the parties. (v) If the husband or wife dies during the period of iddat, the other inherits. (vi) The wife's menstruating after the last occasion when there has been sexual intercourse, assures the husband that she is not going to bear a child to him; her being pregnant may remove the cause of the divorce.

17. Referring to the Talaq-i-bidaai, the learned author states: "By a deplorable, though, perhaps, natural development of the Hanafi law, it is the fourth and most disapproved or sinful mode of talaq that seems to be most prevalent, and in a sense, even favoured by the law. ..... It is indeed possible, that the Hanafi jurists wished to inflict on a husband, who disregarded the requirements of S. 1 36, the penalty of rendering the talaq irrevocable; and there are indications that they considered it always favour to the wife to relieve her of the husband and, "Men have always moulded the law of marriage so as to be most agreeable to themselves"."

18. Professor Tahir Mohammed in his book Muslim Law of India, Third Edition (new version) 2002, after observing that the Hanafi rule recognising and giving effect to improper talaq is not a part of the original Islamic law, has stated : "In a later period of history it was somehow believed, rather misbelieved, that a talaq-e-bid'at was to be given effect invariably in every case - even against the wishes of a repentant husband and an aggrieved wife both of whom may be wanting to continue their marital relationship. As this was never the intention of the jurists of the past, a large number of Muslim countries have enacted laws to outlaw all forms of talaq-e-bid'at."

19. The details regarding the law prevailing in some of the Muslim countries is to be found in Professor Tahir Mohammed's book - Statutes of Personal Law in Islamic Countries; History, Texts and Commentaries (2nd Edn. 1995) 20. The learned author further observed, "It sounds logical and very rational in the social circumstances of India - where legal illiteracy is the order of the day - that unless the husband or the wife insists otherwise there should be a legal presumption that every declaration of 'triple talaq' or 'three talaqs together' was meant only to put emphasis on the words of talaq and not to make the divorce final and terminal. It will be all the more fair and humanitarian to raise such a presumption in a case where after the talaq the parties wilfully resume cohabitation during the iddat or remarry after its expiry. The rules of Islam, after all, aim at keeping married couples united and do not mean to throw them apart against their wishes." "A Muslim husband may, under all schools of Muslim law, effect an out-of-court divorce by his own declaration. This is called talaq. It was in fact a pre-islamic practice which Islam reformed and retained in its law; it was not introduced by Islam. There is nothing in the law of Islam suggesting that the husband is free to exercise the power of talaq in an arbitrary, irrational or unreasonable manner. The Muslim law allows talaq subject to several conditions that are of a dissuasive nature; their purpose is to discourage the husband from exercising his

right without a careful and cool consideration. ..... The Muslim law prescribes a simple procedure for talaq, keeping all chances of reconciliation and reconsideration open. A talaq strictly following this procedure is talaq-e-sunnat - a proper talaq. ..... A major section of Sunni Muslims, called the Ahl-e-Hadis or Salafi, also has no recognition for talaq-ul-bid'at; if pronounced they will at best give it the effect of a proper talaq only." "In the Quran, the verse 65.1 reads thus: "O Prophet! when ye do divorce women divorce them at their prescribed periods and count (accurately) their prescribed periods: and fear Allah your Lord: and turn them not out of their houses nor shall they (themselves) leave except in case they are guilty of some open lewdness. Those are limits set by Allah: and any who transgresses the limits of Allah does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation." The verse clearly indicates that divorce is to take place only when there is proven immorality committed. The wife is not to be driven from the home or to be allowed to go away unless ..."they commit immorality".

"In 'Sunan Abu-Dawud Book 12, No.2172 it is narrated by Muharib that, "The Prophet said: Allah did not make anything lawful more abominable to Him than divorce." In the same book at Number 2173 as narrated by Abdullah ibn Umar: "The Prophet said: Of all the lawful acts the most detestable to Allah is divorce."

21. Counsel for the petitioner placed before us a report titled " Voice of the Voiceless - Status of Muslim Women in India" by Syeda Saiyidain Hameed, a member of the National Commission for Women. That report refers to Muslim women as the weakest link in the generally disempowered chain of Indian womanhood. He invited our attention to the following passages in the Report: "Since marriage in Islam is a contract, it may be dissolved at any time. A Muslim husband of sound mind may divorce his wife whenever he so desires without assigning any reason. The presence of the wife is not even necessary for pronouncing a divorce nor any notice need be given for that purpose. The most popular form of talaq practised in India is Talaq-al-Bid'at, literally translated as "the divorce of the wrong innovation". It allows instantaneous talaq; three pronouncements in a single sitting - "I divorce, I divorce you, I divorce you". In every single of its the Public Hearings NCW found innumerable instances of triple talaq. It was pronounced by men in a single breath, without reason or warning. Women were left stranded with children while the husbands having uttered the three words walked away to start a new life. In cases taken up by the Commission, the talaqs were spoken over the telephone or communicated through a postcard. ..... "

"Muslim women too have the right to seek dissolution of marriage under the system of Khula, but this right is very rarely invoked for the simple reason that her seeking divorce would completely deprive her of whatever she may get from her husband, most importantly, a place to live. This in itself is a great disincentive. It is significant that during

the Public Hearings not a single woman raised the question of Khula,its usefulness or the need to improve upon it and the right of women to seek it. The deponents only expressed their anguish at the tyranny of the triple talaq, which was the single most potent cause of their devastation." "The demand for dowry has never been a part of the Muslim Personal Law but its practice as a social norm has acquired oppressive proportions among Muslims. During the public hearings NCW found itself listening to cases of dowry related atrocities from deponents all over the country. Marriages are held up if dowry demand is not met. Cases of dowry torture, dowry death and bride burning among Muslims are found in each and every State - without exception." "The suffering and deprivations of Muslim women is largely similar to those of the poor and oppressed women of other communities. The Public Hearings, however, brought out some important differences. All women suffer when they are divorced or deserted. The Muslim Woman, suffers not only when she is divorced or abandoned but lives her entire married life under the dread that her husband has the arbitrary power to divorce her and throw her out of the house along with the children at his slightest fancy. At any moment he may bring into the house another woman as his second, third or fourth wife; the woman has no say in this regard. This burden of insecurity colours the entire life of a married Muslim woman. Sometimes she is threatened by her in-laws that a second marriage will be arranged (for more dowry or male heir) and she will either have to accept dividing her meagre resources with the second wife or be slapped with a triple talaq. All doors are firmly shut in her face, the law, which is applicable to women of all other communities, is not for her. She must accept being on the streets after instantaneous triple talaq and token mehr (if any) because her personal law permits it and she must accept her husband's multiple wives because that too is part of her personal law. As for mehr and maintenance, whereas it is equally a part of her personal law, it is hardly ever recognised as an injunction by the men, who flout it, first by getting the Qazi to insert the most nominal amount in the Nikahnama and second by refusing to pay maintenance, regardless of its compulsory status. Although "Zero maintenance" is the norm for Muslim women across the length and breadth of the country, very few voices are raised in protest against this gross violation of Personal Law."

22. Reference was also made by counsel to the following portions of the article by Professor Wener Menski on "Developments in Muslim Law - The South Asian Context", (2000) 3 SCC (Jour) 9, wherein it was observed about talaq, "with Allah, the most detestable of all things permitted." .... "The various forms of divorce by the man are grouped under talaq assunna, comprising the talaq al-ahsan and the talaq al-hasan. Beyond that, the so-called triple talaq the talaq al-bidah, is clearly an innovation and is treated as less than ideal, because it does not allow reconsideration, and evidently bad for women. Not surprisingly, the triple talaq has found favour with men, especially in South Asia, and there has been widespread abuse of this male discretion to divorce. The instant effects of the triple talaq leave Muslim wives totally powerless and, in the harsh social realities of South Asian life, husbands may not even honour their obligations in terms of paying maintenance during the

iddat period and paying dower (mahr). This particular form of divorce clashes head-on with human rights focused concepts of modernity, especially because of its gender bias. Yet at the same time, the talaq is very modern as well, in that it allows freedom of choice to the individual. The difficulty is, of course, that the talaq gives men unilateral power over women and children, and such powers and discretion may be abused too easily, thus creating a definite gender imbalance which a modern state may wish to reduce."

23. Counsel submitted that it is acknowledged by the scholars in the field that Talaq-ul-biddat does not conform to the Quranic injunctions and is an innovation made about two centuries later to avoid restrictions and limitations subject to which divorce was regarded as permissible in the Quran. This later innovation has, however, been at all times regarded as sinful. Though in some cases the Courts have held that this form of talaq, though sinful, is nevertheless valid in law, this form of talaq is violative of the fundamental rights of the Muslim women who are the victims of it's capricious exercise. The adverse consequence on the children was also emphasised by the counsel.

24. Counsel pointed out that the family law of Muslims in India has not so far been codified by statute. The principal preconstitutional enactments governing Muslim Family Law being Muslim Personal Law (Shariat) Application Act, 1937 and Dissolution of Muslim Marriages Act, 1939. The Shariat Act makes Muslim law applicable to all Muslims in respect of matters referred to in Section 2 which reads as under: "Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property for females including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including talaq, Ila, Zihar, Li'an, Khula and Mubarrat, maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments), the rule of decision in cases where the parties are Muslims shall be the Muslim Personal law (Shariat). " The Dissolution of Muslim Marriages Act sets out the grounds on which Muslim women can claim divorce. It does not deal with grounds on which or the procedure to be followed when the dissolution is at the instance of the husband. After the judgment of the Supreme Court in the case of Mohammed Ahmed Khan vs. Shah Ba no Begum, (1985) 2 SCC 55 6, Parliament enacted Muslim Women (Protection of Rights on Divorce) Act, 1986 (Act 25 of 1986), which Act, as held by the Constitution Bench of the apex Court in the case of Daniel Latifi vs. Union of India, (2001) 7 SCC 740, requires that the Muslim husbands make reasonable and fair provision for the future of the divorced wife within the iddat period.

25. Learned counsel for the petitioner invited our attention to the decision of Justice Khalid, who later adorned the Supreme Court, in the case of Mohammed Haneefa vs. Pathummal Beevi, 1972 Ker LT 512, wherein the learned Judge after referring to the unbridled power of a

Muslim husband to divorce his wife, asked: - "Should muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at this monstrosity."

26. Attention was also invited by counsel to the observations of Justice Krishna Iyer in the case of Yousuf Rawther vs. Sowramma, AIR 19 71 Ker 261 that, ".....Since infallibility is not an attribute of the judiciary, the view has been ventured by Muslim jurists that the Indo-Anglian judicial exposition of the Islamic law of divorce has not exactly been just to the Holy Prophet or the Holy Book. ..... The view that the Muslim husband enjoys an arbitrary, unilateral power to inflict instant divorce does not accord with Islamic injunctions. "

27. It was also observed in that decision that, ".. However, Muslim law, as applied in India, has taken a course contrary to the spirit of what the Prophet or the Holy Quoran laid down and the same misconception vitiates the law dealing with the wife's right to divorce." The learned Judge quoted from Dr.Ahmed Galwash's book on `the Religion of Islam', wherein it is stated that, "it is only when all efforts for effecting reconciliation have failed, the parties may proceed to a dissolution of marriage by 'Talak' or 'Khola'."

28. Reference was also made in that decision to the book - Holy Quaran by Moulana Muhammed Ali, wherein the learned author after referring to the verse in the Quran, - "And if ye fear a breach between husband and wife, send a judge out of his family, and a judge out of her family; if they are desirous of agreement, God will effect a reconciliation between them; for God is knowing and appraised of all" , has explained the verse thus: -- "This verse lays down the procedure to be adopted when a case for divorce arises. It is not for the husband to put away his wife; it is the business of the judge to decide the case. Nor should divorce cases be made too public. The judge is required to appoint two arbiters, one belonging to the wife's family and the other to the husband's. These two arbiters will find out the facts but their objective must be to effect a reconciliation between the parties. If all hopes of reconciliation fail, a divorce is allowed, but the final decision for divorce rests with the judge who is legally entitled to pronounce a divorce. Cases were decided in accordance with the directions contained in this verse in the early days of Islam." The permissible form of divorce which form is not sinful, was described by the learned Judge in that decision as disclosing a surprisingly rational, realistic and modern law of divorce.

29. Learned counsel invited our attention to the case of Zeenat Fatema Rashid vs. Md. Iqbal Anwar, 1993 (2) Crimes 853, a decision rendered by a Division Bench of Gauhati High Court which referred to the decisions of the Bombay High Court in the case of Sarabai vs. Rabiabai, ILR 30 Bom. 537, of Madras High Court in the case of Asha Bibi vs. Kadi Ibrahim, ILR 33 Madras 22 and of Calcutta High court in the case of Ahmed

Kasim Molla vs. Khatun Bibi, ILR 59 Cal 833 all of which had been considered by Justice Beharul Islam, who later adorned the Supreme Court, in the case of Jiauddin ahmed vs. Anwara Begum, (1981) 1 GLR 358, wherein the learned Judge had held that the divorce must be for a reasonable cause, and must be preceded by an attempt for reconciliation between the husband and wife by two arbiters, one chosen by the wife from her family and the other by the husband from his side. That decision of Justice Islam was approved by a Division Bench of Gauhati High Court in the case of Rukia vs. Abdul Khalique, (1981) 1 GLR 375.

30. The Division Bench in the case Zeenat Fatema Rashid, 1993 (2) Crimes 853 after referring to the relevant verses in the Holy Quran held that, "The Quran discourages divorce and it permits only in extreme cases after pre-divorce conference. Therefore, a Mahomedan husband, cannot divorce his wife at his whim and caprice. The question then is, - whether, if divorce by talak is made arbitrarily, it should be treated as spiritual offence only? ...Marriage is the basis for social organisation and foundation of legal rights and obligations. ..... Under Section 7 of the Family Court Act, 1984, cases relating the matrimonial status of any person are within the jurisdiction of the Family Court. The Family Court aims at reconciliation and persuasion of parties to arrive at a settlement. For these reasons, if a Mahomedan husband divorces his wife at his whim and caprice, it would not only be a spiritual offence, but it would also affect the divorce. In the above view of the matter, a Mahomedan husband cannot divorce his wife at his whim and caprice, that is, divorce must be for a reasonable cause, and it must be preceded by a pre-divorce conference to arrive at a settlement....."

31. Counsel then referred to the decision of a learned single Judge of this Court Sidickk, J., in the case of Saleem Basha vs. Mumtaz Begam, 1998 Cri. L.J. 4782, wherein the learned Judge considered the question as to whether talaq that had been pleaded in that case was valid in Mohammedan law. After finding that no attempt at reconciliation had preceded the triple talaq, such talaq having been pronounced after the wife had brought a claim for maintenance, after quoting with approval the observations of Justice Beharul Islam of the Gauhati High Court in the case of Jiauddin Ahmed vs. Anwara Begum, (1981) 1 GLR 358, the learned Judge held that divorce under Muslim law can be held to have been duly effected only when it does not violate the injunctions of Quran. The learned Judge quoted with approval the observations of Baharul Islam, that, "In my view the correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation by two relations, one each of the parties, is an essential condition precedent to talaq. It is fallacy that a Muslim male enjoys, under the Quranic law, unbridled authority to liquidate the marriage. The Holy Quran expressly forbids a man to seek pretext for divorcing his wife, so long as she remains faithful and obedient to him."

32. The learned single Judge referred to the decision of the Supreme Court in the case of Fazlunbi vs. K.Khader Vali, AIR 1980 SC 173 0 wherein the decision of Justice Beharul Islam was referred to with

approval, the Supreme Court in that decision having observed - " Before we bid farewell to Fazlunbi it is necessary to mention that Chief Justice Beharul Islam in an elaborate judgment replete with quotes from the Holy Quoran, has exposed the error of early English authors and Judges, who dealt with talaq in Muslim law as good even if pronounced at whim or in tantrum and argued against the diehard view of Batchelor, J., ILR (1906) 30 Bombay 537 (539), that this view is good in law, though bad in theology."

33. Justice Sidickk, in conclusion in paragraph 24 of his judgment held that there must be an attempt at reconciliation before divorce, and that divorce must be preceded among Muslims by an attempt at reconciliation between the husband and wife by two mediators - one chosen by the wife from her family and the other by the husband from his side, "in the above view of the matter a Mohomedan husband cannot divorce his wife at his whim or caprice, i.e., divorce must be for a reasonable cause and it must be preceded by a pre-divorce conference to arrive at a settlement. Even if there is any reasonable cause for the divorce, yet there must be evidence to show that there was an attempt for a settlement prior to the divorce and when there was no such attempt prior to divorce to arrive at a settlement by mediators, then there cannot be a valid divorce under Mohomedan Law."

34. Lastly, reference was made to a judgment rendered by a learned single Judge of Karnataka High Court in the case of Zulekha Begum vs. Abdul Raheem, 2000 (2) Kar. L.J. 70. In that case also reference was made to the decisions of Justice Beharul Islam of Gauhati High Court in the case of Jiauddin ahmed vs. Anwara Begum, (1981) 1 GLR 358, of Justice Khalid of Kerala High Court in the case of Mohammed Haneefa vs. Pathummal Beevi, 1972 Ker LT 512, of Justice Sidickk of this Court in the case of Saleema Basha vs. Mumtaz Begam, 1998 Cri. L.J. 47 82 as also to the decision of the Calcutta High Court in the case of Ahmed Kasim Molla vs. Khatun Bibi, ILR 59 Cal 833 and it was held that a Muslim husband cannot divorce his wife at his whim and caprice and that the divorce must be for a reasonable cause and must be preceded by attempts by arbiters nominated by the families of the parties and it is only when such attempts fail, divorce can be effected.

34. Learned counsel for the petitioner submitted that Section 2 of the Muslim Personal Law (Shariat) Application Act, 1937, if construed as taking within it's fold Talaq-ul-biddat, to that extent it is violative of the fundamental rights of Muslim wives under Articles 14 , 15 and 21 as also 25 of the Constitution, and that in any event there can be no talaq unless it is preceded by attempts at reconciliation and sufficient time for reconsideration, as talaq being in itself undesirable, it is not to be resorted to at the whim and caprice of the husband, and can only be effected for a reasonable cause after deep consideration and sincere attempts of reconciliation.

35. Learned counsel for the petitioner in this context also invited our attention to the law laid down and observations made by the

Constitution Bench of the apex Court in the case of Daniel Laitifi vs. Union of India, 2001 7 SCC 740. The apex Court at paragraph 20 observed thus, "In interpreting the provisions where matrimonial relationship is involved, we have to consider the social conditions prevalent in our society. In our society, whether they belong to the majority or the minority group, what is apparent is that there exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male dominated, both economically and socially and women are assigned, invariably, a dependent role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life - a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner we could compensate her so far as emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the Wakf Boards. Such an approach appears to us to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints. "

36. The Court in that case was concerned with the constitutional validity of the Muslim Women (Protection of Rights on Divorce) Act 198 6 (Act 25 of 1986). The Court held that reasonable or fair provision for the future of the divorced wife obviously includes her maintenance as well, and such a reasonable and fair provision in terms of Section 3(1)(a) of the Act is not limited to the iddat period and extends for the entire life of the divorced wife unless she remarries. The Court held that the emphasis in the section is not on the nature or duration of such "provision" or "maintenance", but at the time within which an arrangement for the payment of provision and maintenance should be made and executed. The Court also held that to construe the provisions of the Act as less beneficial than the provisions under Chapter IX of the Code of Criminal Procedure and to hold that the husband is liable to pay maintenance only for the iddat period would result in unreasonable discrimination against divorced muslim women and would render the Act violative of Articles 14, 15 and 21. The validity of the Act was upheld.

37. One of the added respondents opposed the prayer in the writ

petition and submitted that this form of talaq, though sinful, had been recognised for a long period of time and that the Courts had in the earlier decisions held that this form of talaq though bad in theology, the same was good in law. It was also submitted that any modification of the Personal Law can only be made by statute and further that Personal Law cannot be regarded as being violative of any of the rights given in Part III of the Constitution.

38. Learned Additional Solicitor General submitted that Personal Laws fall outside the ambit of Article 13 of the Constitution, and therefore, the question of declaring any part of the Personal Law of any section of the population of this country as being void on account of inconsistency with the rights guaranteed under Part III of the Constitution, does not arise. Counsel referred to the decision of the Bombay High Court in the case of State of Bombay vs. Narasu Appa Mali, AIR 1952 Bom 84, to the decision of the Supreme Court in the case of Krishna Singh vs. Mathura Ahir, AIR 1980 SC 707 and finally to the decision of the apex Court in the case of AWAG vs. Union of India, 1 997 3 SCC 573. Counsel submitted that the Courts in the past have regarded talaq-ul-biddat 'though bad in theology, as valid in law'. The decision of the Jammu and Kashmir High Court in the case of Ahamed Giri vs. Mst. Begha, AIR 1955 J & K 1 as also the decision of this Court in the case of Asha Bibi vs. Kadir Ibrahim Rowther, XXXIII (1907) ILR 22 were referred to.

39. In the case of State of Bombay vs. Narasu Appa, AIR 1952 Bombay 84, the High Court examined the validity of the Bombay Prevention of Hindu Bigamous Marriages Act and held that it was not discriminatory by reason of bigamous marriages among other communities not having been declared illegal, and that the Personal Law of the different religious communities had not, to the extent of inconsistency with the rights guaranteed under Part III of the Constitution, become void after the Constitution came into force. It was held that 'laws in force' referred to in Article 13 (1) does not include 'Personal Law'. The observations made by Chagla, CJ and Gajendragadkar, J, in this case were approved by the three Judge Bench of the apex Court in the case of AWAG, (1997) 3 SCC 573.

40. In the case of Krishna Singh vs. Mathura Ahir, AIR 1980 SC 707 a two Judge Bench of the apex Court considered the impact of Part III of the Constitution on Personal Laws. At paragraph 17 of the judgment, it was observed thus: "It would be convenient, at the outset, to deal with the view expressed by the High Court that the strict rule enjoined by the Smriti writers as a result of which Sudras were considered to be incapable of entering the order of yati or sanyasi, has ceased to be valid because of the fundamental rights guaranteed under Part III of the Constitution. In our opinion, the learned Judge failed to appreciate that Part III of the Constitution does not touch upon the Personal Laws of the parties ....."

41. In the case of AWAG, (1997) 3 SCC 573 the apex Court

declined to entertain the challenge made to certain aspects of the Muslim Personal Law, and to certain portions of statutes governing the Hindu Personal Law, the challenge being based on the ground that those aspects were violative of Articles 13, 14, 15 and 21 of the Constitution. The Court rejected the challenge by holding that they are issues of state policy with which the Court will not ordinarily have any concern and that the remedy lies somewhere-else and not by knocking at the doors of the Courts. The prayers made in those petitions under Article 32 included prayers to declare as void and unconstitutional, aspects of Muslim Personal Law concerning polygamy and unilateral divorce by the husband without the consent of his wife and without resort to the judicial process.

42. The Supreme Court in it's recent decision in the case of Shamim Ara vs. State of U.P., 2002 AIR SCW 4162, has examined the preconditions for a valid talaq in Muslim Personal Law. The Supreme Court referred to the observations of Justice Khalid in the case of Mohammed Haneefa vs. Pathummal Beevi, 1972 Ker LT 512, of Justice V.R.Krishna Iyer, in the case of Yousuf Rawther vs. Sowramma, AIR 1971 Ker 261 and those of Beharul Islam, J. sitting singly in Gauhati High court in the case of Jiyauddin ahmed vs. Anwara Begums, (1981) 1 Gauhati LR 35 8 and later speaking for the Division Bench in the case of Rukia Khatun vs. Abdul Khalique Laskar, (1981) 1 Gauhati LR 375.

43. Paragraph 13 of that judgment reads as under: "There is yet another illuminating and weighty judicial opinion available in two decisions of Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in Sri Jiauddin Ahmed vs. Mrs.Anwara Begum, (1981) 1 GLR 358 and later speaking for the Division Bench in Must. Rukia Khatun vs. Abdul Khalique Laskar, (1981) 1 GLR 375. In Jiauddin Ahmed's case, a plea of previous divorce, i.e., the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim Law? The learned Judge observed that though marriage under the Muslim Law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage-tie, Islam recognizes the necessity, in exceptional circumstances, of keeping the way open for its dissolution. (Para 6). Quoting in the judgment several Holy quaranic verses and from commentaries thereon by wellrecognized scholars of great eminence, the learned Judge expressed disapproval of the statement that "the whimsical and capricious divorce by the husband is good in law, though bad in theology" and observed that such a statement is based on the concept that women were chattel belonging to men, which the Holy Quran does not brook. The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be proceeded by attempts at reconciliation between the husband and the wife by two arbiters - one from the wife's family and the other from the husband's; if the attempts fail, talaq may

be effected (Para 13). In Rukia Khatun's case, the Division Bench stated that the correct law of talaq, as ordained by Holy Quaran, is : (i) that 'talaq' must be for a reasonable cause; and (ii) that it must be proceeded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail, 'talaq' may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay view which, in their opinion, did not lay down the correct law." 44. At paragraph 14 of that judgment, the apex Court held, "We are in respectful agreement with the above said observations made by the learned Judges of High Courts. We must note that the observations were made 20-30 years before and our country has in recent times marched steps ahead in all walks of life including progressive interpretation of laws which cannot be lost sight of except by compromising with regressive trends. "

45. Thus, the law with regard to talaq, as declared by the apex Court, is that talaq must be for a reasonable cause and must be preceded by attempt at reconciliation between the husband and the wife by two arbiters one chosen by wife's family and the other from husband's family and it is only if their attempts fail, talaq may be effected.

46. The judgment of Justice Sidickk of this Court in the case of Saleem Basha, 1998 Cri.L.J. 4782 to which we have referred earlier, is in conformity with the law now declared by the Supreme Court in the case of Shamim Ara, 2002 AIR SCW 4162. The earlier judgments to the contrary, of this Court and of other High Courts can no longer be regarded as good law.

47. The grounds on which the petitioner has sought a declaration that Section 2 of the Muslim Personal Law (Shariat) Application Act, 19 37 in so far as it seeks to recognise and validate Talaaq-ul-Biddat or Talaaq-i-Badai form of divorce, as void and unconstitutional, are mainly that it does not provide for reconsideration and is not preceded by attempts at reconciliation.

48. Having regard to the law now declared by the apex Court in the case of Shamim Ara, 2002 AIR SCW 4162, talaq, in whatever form, must be for a reasonable cause, and must be preceded by attempts for reconciliation by arbiters chosen from the families of each of the spouses. The petitioner's apprehension that notwithstanding absence of cause and no efforts having been made to reconcile the spouses, this form of talaq is valid, is based on a misunderstanding of the law.

49. Muslim Personal Law (Shariat) Act, 1937 provides for the application of Muslim Personal Law to all questions regarding, inter alia, "...marriage, dissolution of marriage, including talaq, ila, zihar, lian, Khula and mubaraat .....". That Act is clearly a legislation dealing with Personal Law. Section 2 of that Act, in whole or in part, cannot, having regard to the decisions of the apex Court in the case of AWAG, 1997-3 SCC 573, and in the case of Krishna Singh vs. Mathura

Ahira, AIR 1980 SC 707, be declared as void or unconstitutional by reason of any inconsistency with Part III of the Constitution.

50. The prayer made in the writ petition, therefore, cannot be granted. The writ petition is dismissed.

(R.J.B.,J.) (E.P.,J.)
27.12. 2002
Index : Yes Net : Yes

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